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Rapporteur: Mr. Francisco Villagran Kramer

CHAPTER VI

The law and practice relating to Reservations to Treaties

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A. Introduction

1. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its programme of work, at its forty-sixth session (1994), the topic "The law and practice relating to reservations to treaties".

2. At its forty-sixth session, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic. 1/

3. At its forty-seventh session, the Commission received the first report of the Special Rapporteur on the topic. 2/

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the Special Rapporteur's first report on the topic (A/CN.4/470 and Corr.1). The Commission considered the report at its 2400th to 2404th; 2406th to 2407th; 2412th and ... meetings held from 14th to 22nd; 28th to 29th June; 6th and .. July 1995.

(a) Presentation of the first report by the Special Rapporteur

5. In introducing his first report, the Special Rapporteur stated that the question of reservations to treaties was not terra incognita for the Commission, which had already studied it on four occasions, first in 1951 in connection with the topic of the law of treaties, and later within the framework of the work which had led to the adoption of the Convention on the Law of Treaties (1968), the Convention on the Succession of States in respect of Treaties (1978), and the Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

6. The Special Rapporteur, like his predecessors, believed that the question of reservations to treaties was probably one of the most difficult in the whole of public international law. The first problem which is of a technical nature, required to reconcile two imperatives: the need to maintain the essential elements of the treaty on the one hand, and the need to facilitate as far as possible, accession to multilateral treaties of general interest. There was also the problem of political motives behind what appeared to be technical considerations for making reservations. However, with the

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1/ Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 382.

2/ Document A/CN.4/470 and Corr. 1.

completion of political decolonization and the end of the cold war, the question of reservations could now be tackled in a more serene manner. The Special Rapporteur furthermore referred to problems of a doctrinal nature as regards in particular the question of the "validity" of reservations. The term, "validity" of reservations, he observed, could be interpreted as covering two separate questions: the permissibility of reservations, on the one hand, and their opposability, on the other. The doctrinal differences between the permissibility and the opposability of reservations in that area, he noted, were so marked as to make it possible to speak of a "school of permissibility" on one hand, as against a school of "opposability" on the other.

7. More recently, the Special Rapporteur noted, there has been a revival of this controversy by international human rights bodies, in particular, the Human Rights Committee, the European and Inter-American Commissions and Courts of Human Rights, by their adoption of a bold new stand on the special problems of reservations to human rights treaties. Those developments, welcomed by some States but strongly criticized by others, added to the complexity of the topic to such a point that the question arose whether a uniform legal regime governing reservations to treaties was necessary or possible.

8. The report under consideration comprised three chapters; Chapter I dealt with the Commission's previous work on the topic of reservations, Chapter II contained a brief inventory of the problems of the topic, and Chapter III which discussed the possible scope and form of the Commission's future work on the topic. According to the Special Rapporteur, Chapter I was intended to act as a refresher of the essential stages in the topic's long history, starting in 1950 with the first report by Mr. James Brierly and ending in 1986 with the adoption of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The most important stages in that process, it was noted, had been the Advisory Opinion of the International Court of Justice in 1951 on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide; 3/ the first report by Sir Humphrey Waldock in 1962, 4/ which had led the Commission to adopt the flexible system provided for in article 2,

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3/ I.C.J Reports, (1991), p. 15.

4/ Yearbook of the International Law Commission Vol. II (1962) p. 27.

paragraph 1 (d) and articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties - subsequently supplemented by the 1978 Vienna Convention on Succession of States in respect of Treaties - and in the relevant articles of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which essentially reproduced the corresponding passages of the 1969 Vienna Convention on the Law of Treaties. In his review of those milestone events, the Special Rapporteur realized that work had been difficult and that a balance had to be struck between widely differing doctrinal and political opinions and that solutions had been arrived at, in many cases, only at the cost of deliberate ambiguities. However, the general trend was clearly in favour of an increasingly strong assertion of the right of States to formulate reservations to the detriment of the right of other contracting States to oppose such reservations, even if the right of other contracting States to oppose, on an individual basis, the entry into force of the treaty between themselves and the reserving State was maintained. Moreover, the Vienna Convention of 1978 by express referral to it, and the Vienna Convention of 1986, virtually by reproducing it, had the effect of strengthening the system established by the Vienna Convention on the Law of Treaties of 1969, even though the latter Convention, which given its many ambiguities and gaps, had little that was "systematic" about it.

9. In his study of the problems involved, which is the subject of Chapter II of his Preliminary Report, the Special Rapporteur had relied on the limited information available to him about State practice, the practice of the Secretary-General of the United Nations as depositary and on information supplied by several international organizations of the United Nations system as well as from the Council of Europe and the Organization of American States.

10. The Special Rapporteur indicated in particular, that information on reservations to treaties had particularly been found lacking in so far as State practice was concerned. He hoped to prepare a questionnaire to be addressed to Governments for information and that members of the Commission might also assist him with any information available to them about the practice in their own or in other countries relating to this topic. In Chapter II of the report, the Special Rapporteur had drawn out a long list of questions which he thought posed problems and asked for any suggestions on the order in hierarchical importance in which these problems might be placed.

Many of these problems could be related to the counter-contradiction between the schools of permissibility and of opposability, the adherents of the permissibility school considering that a reservation contrary to the object and purpose of the treaty was in itself void, irrespective of the reactions of the co-contracting States, while those of the opposability school, on the other hand, thought that the only test as to the validity of a reservation consisted of the objections of the other States. 5/

11. Therefore, according to the Special Rapporteur, if the "permissibilitists" were right, the nullity of a reservation incompatible with the object and purpose of the treaty could be invoked before an international or even a national tribunal even if the State claiming the nullity of the reservation had not itself made any objection to it, whereas, if the "opposabilitists" were right, a State could not avail itself of a reservation contrary to the object and purpose of the treaty even if the other contracting State had accepted it.

12. In his report, the Special Rapporteur had raised other questions of a particularly thorny nature. The first one of these was the effect of an impermissible reservation. Did it entail nullity of the expression of consent of the reserving State to be bound, or only nullity concerning the reservation itself? He noted that the case-law of international human rights protection bodies showed that the answers to those questions had considerable practical effects. 6/

13. Another difficult problem that the Special Rapporteur pointed out, concerned the question of objections to reservations. Should a State, in formulating an objection, be guided by the principle of the reservation's compatibility with the object and purpose of the treaty, or could it exercise discretion in the matter? There too, he observed, one encountered the conflict between permissibility and opposability. He also wondered, what would be the effects of an objection to a reservation if, as article 21,

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5/ For the importance of the practical consequences of those conflicting positions see Case concerning the delimitation of the Continental Shelf between the United Kingdom and France; Reports of International Arbitral Awards, Vol. XVIII; p. 3ff (30 June 1977).

6/ The Belilos case adjudicated by the European Court of Human Rights in 1988 posed a number of practical problems for the Swiss Government. See European Court of Human Rights, Series A, No.132 (29 April 1988).

paragraph 3 of the 1969 and 1986 Vienna Conventions permitted, the State objecting to the reservation had not opposed the entry into force of the treaty between itself and the reserving State?

14. Another group of difficult questions encountered by the Special Rapporteur related to interpretative declarations. How could such declarations be distinguished from reservations in the strict sense of the term and, in the case of genuine interpretative declarations, what were their legal effects?

15. Furthermore, according to the Special Rapporteur, the effect of reservations and objections on the entry into force of the treaty was far from clear.

16. The Special Rapporteur also noted that the 1978 Convention was silent on the fate of objections to reservations in the event of State succession. He wondered whether the successor State "inherited" the objections formulated by the predecessor State and whether it could formulate new objections itself. The replies provided by State practice, were, it seemed, always uncertain.

17. Still another fundamental point raised by the Special Rapporteur was whether there were areas in which the existing regime of reservations and objections to reservation was not satisfactory. He had in mind in particular the human rights treaties where the main consensual element that permeated the whole regime laid down under articles 19 to 23 of the 1969 Vienna Convention was challenged not only by certain writers but also by international bodies concerned with the protection of human rights. 7/ If the system provided for under the 1969 Convention was not satisfactory, he inquired in what way it should then be modified or whether it should be abandoned altogether in the case of human rights treaties. He noted that, regardless of the question of the constituent instruments of international organizations or provisions codifying customary rules, there were perhaps other areas - for instance, environment and disarmament treaties - which should be recognized as calling for special treatment.

18. Lastly, the Special Rapporteur considered that it would be appropriate at some stage in the work on the topic to raise the question of "rival" techniques of reservation, whereby States parties to the same treaty could

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7/ That dispute had been reopened with some force in 1994 with the General Comment No. 24 of the Human Rights Committee. See document CCPR/C/21/Rev.1/Add.6, para. 18 (2 November 1994).

modify their respective obligations by means of additional protocols, bilateral arrangements or optional declarations concerning the application of a particular provision.

19. The Special Rapporteur stressed that he had not at the present stage attempted to provide answers to these questions. The main thing was to identify all the problems properly, and that this was his sole ambition at the present session.

20. Chapter III of the report dealt with the scope and form of the future work of the Commission on the topic. On that point the Special Rapporteur called on the Commission to take a clear stand at the current session.

21. With regard to the scope of the future work and the form it would take, the Special Rapporteur emphasized the fact that there had been much written not only by academic writers, but by the Commission itself. Three conventions had been adopted and despite or perhaps because of their ambiguities they had proved their worth. He therefore considered that it would be improper to call into question the work of the Commission's predecessors, to which States were, on the whole, attached. He expressed a firm conviction that what had been achieved should be preserved, regardless of possible ambiguities. Moreover, in his view, the rules on reservations set forth in the Vienna Conventions on treaties operated fairly well. The potential abuses had not occurred and, even if States did not always respect the rules, they at least regarded them as a useful guide. It seemed, at least prima facie, that those rules had now acquired customary force. It was therefore his fervent hope that the Commission would not start to question what had been achieved but that it would instead seek to determine such new rules as might be necessary to complement the 1969, 1978 and 1986 rules without throwing out the old ones, which in his view were certainly not obsolete.

22. Additionally, he said, if the Commission were to adopt norms that were incompatible with articles 19 to 23 of the 1969 and 1986 Vienna Conventions on the law of treaties or even with article 20 of the 1978 Vienna Convention on State succession, States which had ratified, or would in the future ratify, those Conventions would be placed in an extremely delicate position: some of them would have accepted the existing rules and would be bound by them, others would be bound by the new rules that would be incompatible with the rules already adopted; and yet others could even be bound by both, depending on their partners.

23. In the light of the above, the Special Rapporteur suggested that the existing articles of the Vienna Conventions should be treated, as a matter of principle, as well established during the course of work on the topic, unless they proved to be wholly impracticable. Where possible and desirable, ambiguities should be removed and an attempt should also be made to fill any gaps, if only to avoid any anarchical developments.

24. As for the form that should be given to the Commission's work, the Special Rapporteur suggested a number of possibilities open to the Commission. This included the treaty approach, which could itself take two different forms; one possibility would be to draft a convention on reservations that would reproduce in their entirety the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions subject only to clarification and completion where necessary. The mere fact of repeating the existing rules would preclude any likelihood of incompatibility. The other possibility would be to adopt one or three draft protocols that would supplement, but not conflict with, the existing 1969, 1978 and 1986 Conventions. In both cases, the Commission would be following the tried and tested method of submitting draft articles together with commentaries.

25. Apart from drafting treaties, the Special Rapporteur suggested other possibilities, including the drawing up of a guide on the practice of States and international organizations in the matter of reservations. Such a guide could take the form of an article-by-article commentary to provisions on reservations in the three Vienna Conventions, prepared in the light of developments since 1969 and designed to preserve what had been achieved, along with the necessary clarifications and additions.

26. A complementary approach would be for the Commission to propose model clauses from which inspiration could be drawn when negotiating a treaty, depending on the particular requirements of the treaty. This approach, if followed, according to the Special Rapporteur, would make for flexibility and would be of great use to States. In the opinion of the Special Rapporteur, model clauses had two advantages. First, by proposing a variety of clauses of derogation, it would counterbalance the general trend towards more precision by providing for more flexibility. Second, there were at the present time fairly strong centrifugal forces which were reflected in the challenging of existing rules in certain areas. That was particularly true in the area of human rights. There was no certainty that the problem which arose concerning the human rights conventions could be resolved simply by interpreting the existing rules. Model clauses for human rights treaties would, in his view,

probably provide a viable solution for the future. Although it would be difficult, if not impossible to draw up an exhaustive list of all the clauses relating to reservations set forth in the existing multilateral conventions, a catalogue of such clauses could be made on the basis of a sufficiently representative sample of the various areas covered by treaties such as those on human rights, disarmament, international trade and so on. The drafting of model clauses would thus be a useful complement to the Commission's basic task on this question.

27. The last problem raised by the Special Rapporteur concerned the title of the topic. He did not find the title of the topic, namely, "The law and practice relating to reservations to treaties" to be a satisfactory one. It had, in his view, an academic ring to it. Moreover, it gave the impression that the law and the practice were distinct and could be detached from each other. He proposed a more neutral, and probably more accurate, title such as "Reservations to treaties".

28. In conclusion, the Special Rapporteur sought urgent assistance and orientation from the Commission on the following questions:

(i) Did the Commission agree to change the title of the topic to "reservations to treaties"?

(ii) Did it agree not to challenge the rules contained in article 2, paragraph 1 (d) and articles 19 to 23 of the Vienna Conventions of 1969 and 1986 and article 20 of the Vienna Convention of 1978 and to consider them as presently formulated and to clarify and complete them only as necessary?

(iii) Should the result of the Commission's work take the form of a draft convention, a draft protocol(s), a guide to practice, a systematic commentary or something else?

(iv) Was the Commission in favour of drafting model clauses that could be proposed to States for incorporation in future multilateral conventions in keeping with the field in which those conventions would be concluded?

He also called for comments from members of the Commission on the problem areas discussed in Chapter II.

(b) Summary of the debate

(i) General observations

29. Members of the Commission paid tribute to the Special Rapporteur for his well articulated report, which reflected the calibre of his scholarship and his masterly grasp of the subject matter. The report provided the background

to the question, gave a review of the problems posed and made a number of suggestions as to how the Commission might deal with those problems. Moreover, it was easy to read and provide the basic information needed at this preliminary stage. Some members called for the updating of the study of the practice of the Secretary-General in respect of reservations to multilateral conventions. They also believed that it would be most helpful at an early stage to ask the principal depositaries of treaties within and outside the United Nations system for information on their experience, in particular, how they resolved in practice some of the uncertainties and inconsistencies that the Commission would have to examine, and what main problems States met in relation to reservations.

30. The question of reservations to treaties was, according to some members, one of the most controversial issues in contemporary international law. The many differences both of doctrinal and political nature, have however, been significantly reduced over a long process of compromises between the traditional approach and that which favoured more freedom with regard to the formulation of reservations. The final text of the 1969 Vienna Convention on the Law of Treaties pertaining to reservations was based on proposals made by the Commission, which had abandoned the unanimity rule in favour of a more flexible system. One member insisted on the Pan-American origin of this new system. The Commission believed at the time that a more flexible system would result in an increase in the number of parties to multilateral treaties and correspondingly also in the number of reservations made to those treaties. According to some members, it was in order to achieve a balance between the opposing views on reservations to treaties, that the relevant provisions in the Vienna Conventions were couched in ambiguous terms and contained many gaps that required to be clarified and filled.

31. According to some members, although the "cold war" and the process of political decolonization had ended, this had not diminished the significance of reservations to multilateral treaties. Each one of the numerous States in the world formed a complex socio-political entity with specific interests of its own; but the rules established by treaties were the same for all parties. The idea of reservations to treaties was to ensure the consistency of international law so far as essentials were concerned, while, on the other hand, offering States a possibility of safeguarding their special interest

subject to specific conditions. Moreover, the entitlement to make reservations and to become party to a convention subject to such reservations, was a sovereign right enjoyed by every State under international law.

32. All members shared the view of the Special Rapporteur that there was no reason, in principle, to reopen the text that had emerged from the 1969 Vienna Conference. They agreed that the Commission should simply try to fill the gaps and remove ambiguities while retaining the versatility and flexibility of the key articles of the 1969, 1978 and 1986 Vienna Conventions. However, a few members expressed some doubts as to the possibility of preserving in their entirety the existing rules.

33. Some members expressed the view that the three Vienna Conventions had not clarified the ambiguities inherent in the question of reservations and that many questions and problems remained unanswered. Sometimes, the solutions afforded by practice and jurisprudence had merely complicated the issue or, at best, papered it over. In their view, that was not surprising, since reservations to treaties now formed an integral part of the contemporary international legal order in the world that was witnessing an unprecedented trend towards the codification and progressive development of the rules of international law affecting many areas of life throughout the world, the oceans, the outer space and the global environment itself. The general framework for the regime of reservations was introduced in article 19, paragraphs (a) and (b) of the 1969 Vienna Convention which in paragraph (c) also provided a safety net by laying down the concept of incompatibility with the object and purpose of the treaty. To a large extent, and in so far as the realities of the 1960s had permitted, the Vienna Convention regime had managed to reconcile two fundamental requirements: the importance of attracting the widest possible participation in treaties, and the need to recognize that in certain cases - whether due to religion, to culture, to deep-seated traditions, or even to political expediency - a State would be willing to be bound by most of the obligations under a treaty if its position on a specific issue was preserved. In a sense, it was observed, reservation was the price paid for broader participation.

34. The view was expressed that while the drafters of the definition of the term "reservation" in article 2, paragraph 1 (d) of the 1969 Vienna Convention on the Law of Treaties had exercised great care, an important element was missing from the definition. By virtue of a reservation, it was stated, a

State party could only reduce the scope of its obligation towards other State parties and under no circumstances unilaterally increase rights set forth in the treaty. States therefore made use of reservations in order to evade or avert certain burdensome obligations, but not to arrogate new rights or more extensive rights than those provided by the treaty concerned.

35. It was however pointed out in this connection that it was not at all clear that a reservation could only reduce the obligations, and never increase the rights of its author. An example was cited of the 1977 arbitration between the United Kingdom and France with regard to the Mer d'Iroise, 8/ in which France had entered a reservation to article 6 of the 1958 Convention on the Continental Shelf to the effect that those islands were covered by the special circumstances defined in the said article 6. According to the United Kingdom, however, France's "reservation" had in fact been an interpretative declaration and not a reservation as such. The judge had ruled that it had been a reservation. That reservation, by allowing France not to apply the median line, but another boundary line based on the special circumstances, had in fact increased the rights of its author.

36. With regard to interpretative declarations, some members observed that it was not always easy to draw a distinction between reservations and interpretative declarations. In general, a reservation specified the scope of the declaration accepting the treaty's obligations, whereas interpretative declarations did not affect that scope, which was determined by the sole content of the treaty. An interpretative declaration's sole purpose was to influence the process of treaty interpretation without however, committing other States parties to it.

37. Other members stated that States tended to resort to "interpretative declarations" in order to try to amend a treaty at the time of ratification or to bypass the prohibition of reservations to a treaty. In such hypotheses, case-law showed that such "interpretative declarations" must be taken to be reservations if they were consistent with the definition in the convention concerned. Some conventions did not permit the making of reservations. In such cases, States were permitted to make declarations or certain "understandings" at the time of ratification. The practice of the ILO in this regard was cited.

8/ op. cit., note 5.

38. Although each State was free to make an "interpretative declaration" at the time of its ratification of an international Convention, the depositary, for example, in the case of the ILO, the Director-General, would assess the meaning and scope of the declaration according to the following criteria: the terms of the Convention, the travaux préparatoires, and the practice of the ILO monitoring bodies, more especially the Committee of Experts on the Application of Conventions and Recommendations. If the declaration did not meet those criteria, the ratification would be rejected. In that case, it would be considered that the "interpretative declaration" was in fact equivalent to a reservation, which was incompatible with the object and purpose of the Convention.

39. Some members expressed the view that, interpretative declarations were widely, but wrongly used by the parties to a treaty. In their view, no less than one third of such declarations were disguised reservations, since under the terms of article 2, paragraph 1 (d), of the 1969 Vienna Convention, reservations excluded or modified the legal effect of certain provisions of the treaty in their application to the declarant State. Even where a Convention expressly provided for a distinction between a reservation and an interpretative declaration, the parties to the Convention did not respect the distinction. For instance, it was noted, article 309 of the Convention on the Law of the Sea prohibited reservations unless they were expressly permitted under other articles in that Convention. Article 310, however, provided that article 309 did not preclude a State from making a declaration "with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention provided that such declarations ... do not purport to exclude or modify the legal effect of the provisions of the Convention in their application to that State". It was apparent that the effect of some of the reservations to the Convention was to exclude or modify the legal effect of its provisions in relation to the declarant State. While it could be said that the use of the word "purport", as used in article 310, prevented a declaration from being a reservation simply because the alleged intent of the declarant State was that the declaration should not modify the legal effects of the Convention in relation to that State, the real meaning of the term "purport" was irrelevant if its actual effect was to alter the legal effect of the Law of the Sea Convention in relation to the declarant State.

40. Other members stated that they could not accept the view expressed by the Commission in its commentary to article 2 of the draft articles on the law of treaties 9/ to the effect that a declaration made by a State could in some cases amount to a reservation. A reservation, it was said, was a legal act whose effects were determined by law, whereas a declaration was a political act without any legal effects under the law of treaties. At the same time a declaration fell within the category of "State practice" and for that reason could, if accepted, introduce changes in standards of international law (opinio juris).

41. Some members observed that the Vienna Conventions were silent on the question of the distinction between reservations and interpretative declarations. According to them, it was not known, for example, when, by whom and by what majority of contracting parties was a declaration to be considered a genuine reservation. The point was also made that it was extremely difficult to make a distinction between "qualified interpretative declarations" and "interpretative declarations". These unresolved issues relating to declarations and their legal effects thus, required further examination, especially since States seemed to resort to them with increasing frequency.

42. The view was also expressed that the difference between interpretative declarations and reservations was to be determined by what was permissible or not permissible under a State's domestic law, and to what extent that State was prepared or able to change its domestic law in the prevailing political, economic and social or religious conditions.

43. Several members commented on the question of the validity of reservations. According to some members the expression "validity of reservations" was neutral and comprehensive enough to encompass both the permissibility and opposability of a reservation.

44. For some members, a reservation prohibited by a treaty or contrary to the treaty's object and purpose, even if accepted by all the other parties, was considered impermissible. That approach, it was said, was consistent with the terms of article 19 of the 1969 Vienna Convention. Moreover, the "flexible" system followed in that Convention was adopted following the advisory opinion

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9/ Yearbook of the International Law Commission, (1966), vol. II, pp. 189-190.

rendered by the International Court of Justice on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide in 1951. 10/

45. Some members expressed the view that it ought to be relatively easy to ascertain whether an attempt was being made to evade a clear-cut prohibition on reservations contained in the instrument in question, such as the Convention on the Law of the Sea or the recently adopted treaty creating the World Trade Organization. It was however considered to be much more difficult to assess whether a particular reservation was incompatible with the object and purpose of a treaty. In order to make that determination, agreement had to be reached on what constituted the "core" provisions of the treaty, without which a treaty would lose its essential thrust.

46. As to a determination whether the requirements of compatibility of a reservation with the object and purpose had been met, the view was expressed that it was not possible from a proper reading of articles 19 and 20 of the 1969 Vienna Convention to conclude that such a determination can be made whether the requirement of compatibility under article 19, paragraph (c) had been met. Sometimes, parties might not settle the issue by themselves. In that case they require recourse to a dispute settlement body to make the determination. In that event, any party could make an objection to any reservation since the question whether the requirements of article 19 had been met would have to be determined either mutually by the parties or perhaps, ultimately, by a dispute settlement mechanism.

47. Notwithstanding the existence of peaceful settlement mechanisms, part of the problem, however, stemmed from the fact that, since 1969, following the adoption of the Vienna Convention, dispute settlement mechanisms have rarely been used to resolve problems relating to reservations.

48. According to some members, the term "permissibility" must not be allowed to disguise the fact that, ultimately a determination as to permissibility of a reservation would have to be made either by agreement between the parties or by a dispute settlement body. A reservation which was regarded by one party as potentially incompatible with the object and purpose of a treaty, in

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10/ I.C.J. reports (1951), p. 15.

their view, might not be so regarded by another party. In the circumstance, it would be preferable to speak of a reservation that met the requirements for formulation under article 19.

49. Several members concluded however that, although the "permissibility school" was probably right in theory, the "opposability school" more accurately described the actual practice of States.

50. Other members referred to the problems left unresolved by the 1978 Vienna Convention on Succession of States in respect of treaties. According to one member, article 20 of the Convention did not cover all categories of succession, such as cession of a part of a territory or unifying or dissolution of a State. The fact that the 1978 Convention contained a provision on reservations for newly independent States but none for other categories reflected a certain philosophy. The essential rule in the case of a newly independent State was the "tabula rasa" rule, set forth in article 16 of the Convention under which a newly independent State was not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty had been in force in respect of the territory to which the succession of States related. The act of "notification of succession" by which a newly independent State established its status as a party to any multilateral treaty had some elements in common with an act whereby a State expressed its consent to be bound by a treaty. In their view, it therefore appeared entirely logical that the Convention should give a newly independent State the right to formulate its own reservations in respect of a treaty, while at the same time proceeding on the principle that reservations made by the predecessor State should be maintained except in the event of the indication of a contrary intention by the successor State.

51. As for cases of cession of State territory, the situation, it was said, was not the same. For such cases, the principle of variability of the territorial limits of a treaty applied and, consequently, the problem of succession in respect of treaties did not arise (except in the case of treaties establishing frontiers and other territorial regimes). In such cases, however, the rule of continuity applied ipso jure and the treaty was maintained in the form in which it had existed at the date of succession.

52. Similarly, it was said, in cases of uniting or dissolution of States articles 31 and 34 of the Convention confirmed the rule of continuity ipso jure. In such cases, no expression of the will of the successor State was required in order to bring the continuity rule into operation and therefore no new reservations were called for. As for the withdrawal of the reservations of the predecessor State, the relevant rules of the law of treaties codified in the 1969 Convention were applicable and, accordingly, there was no need for new rules to be formulated in the context of the topic under consideration.

53. However, several members remarked that the problems related to State succession in matters of reservations and objections to treaties should have a low degree of priority in the future work of the Commission.

54. With reference to the question of reservations to human rights conventions, some members expressed the view that the issue of the relative incompatibility between the concept of reservations, based on reciprocity, and human rights treaties was of such importance that it might warrant exceptional treatment by the Commission. In this connection, the view was expressed that no reservations should be made to human rights treaties. According to some members, derogation may only be made, but for a short period of time, if due to economic difficulties a State was unable to fulfil its obligations under that treaty.

55. A suggestion was made that the Commission might be guided by the ILO practice with regard to human rights instruments. According to other members, a mechanism of the type envisaged in the Human Rights Committee's General Comment No. 24 of 2 November 1994 11/ might also be adopted by the Commission.

56. Some members made reference to reservations to bilateral treaties. They drew attention to the statement contained in paragraph (1) of the introduction to the commentary to article 20 of the draft articles on the law of treaties to the effect that a reservation to a bilateral treaty amounted to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. 12/ That view had been supported by the participants

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11/ op. cit., note 7.

12/ Yearbook ... 1966, vol. II, p. 203.

in the Vienna Conference, and the resulting Conventions did not refer to the possibility of reservations to bilateral treaties, although they did not expressly prohibit them.

57. According to some members, in a bilateral relationship, either the two parties agreed on the actual scope of their mutual obligations and rights or they did not. For that reason, it was said, reservations to bilateral treaties should be excluded from the Commission's work, or the Commission should confine its work to reservations to multilateral treaties as a first stage, and could take up reservations to bilateral treaties later if it was deemed necessary.

58. In the same vein, reference was made with respect to article 20, paragraph 2, of the 1969 Vienna Convention which deals with treaties whose reservations required the consent of all States parties. It was suggested that the Commission should leave aside the study of this question, because of the limited number of States parties involved and because the nature of the treaty's object and purpose made it essential that all the parties give their consent.

59. With regard to the final form of the work on the topic, several members favoured the approach of drafting guidelines and model clauses. This approach, it was said, was a reasonable objective through which the Commission would be enabled to examine and to fully appreciate the technicalities involved. This approach, at least at the initial stage, would not prejudge the outcome of the final draft; if at a later stage the Commission decided otherwise, it would still be possible to transform the guidelines into a draft protocol or draft convention.

60. Some members did not favour the adoption of a mere study. In their view, apart from the fact that embarking on the preparation of such a guide would be quite inconsistent with the proposed change of title, they could not find any reference to preparing studies in the Commission's Statute in which articles 16 and 20 spoke only of "draft" or "final drafts" in connection with both the progressive development and codification of international law.

61. Some members favoured the elaboration of draft protocols to existing conventions. Others felt that the drafting of protocols or of a "consolidated" set of articles in a separate instrument might turn out to be as risky as going back to the drawing board and cautioned against taking that approach. Moreover, it was said, if the articles that could take the form of

a protocol did not meet with general approval, there would be two systems of reservations: one with and one without a protocol. The parties to a treaty and the parties to an additional protocol might not be the same, and many States would them find themselves at cross purposes, thus creating more confusion.

62. Some members expressed the view that while there were a number of options open to the Commission about the final outcome of its work, it was however too early to make any firm prediction on that score and preferred to wait until the work was advanced enough before making that determination.

63. As for the proposal of the Special Rapporteur to change the title of the topic, all members who spoke on this question expressed their agreement as a matter of principle. Several members cited previous precedents within the Commission when the title of a topic was changed, for example, the draft "Convention on succession of States in respect of matters other than treaties" was later changed to "Vienna Convention on Succession of States in respect of State Property, Archives and Debt". The proposed change, it was said, should of course not alter the substance of the topic.

64. Some members, while sympathizing with the Special Rapporteur's view that the title of the topic should be changed to "Reservations to treaties", expressed caution towards making such a change. Since the title had been established by the General Assembly, any change would lead to unpredictable debate in the Sixth Committee in which an incorrect impression might be gained that the proposed change reflected a shift in the Commission's substantive approach to the topic.

(ii) Summing-up by the Special Rapporteur

65. In his summing-up, the Special Rapporteur stated that five main substantial issues had received wide commentary from the members of the Commission; namely, (a) the definition of reservations, (b) the quarrel between the permissibility and the opposability schools, (c) settlement of disputes, (d) succession of States, and (e) whether or not there should be a special regime for reservations to human rights treaties.

66. As regards the definition of reservations, the Special Rapporteur stated that some members thought that there existed a gap in the definition as provided in paragraph 1 (d) of article 2 of the Vienna Convention on the Law of Treaties in the sense that that provision did not specify that a reservation could not for the author State provide the means to obtain rights

that were not provided for by the treaty. In the Special Rapporteur's view, this was not a problem of definition. The question was whether a State could obtain rights through reservations which were not provided in the treaty. The answer to that question was not obvious. The Special Rapporteur indicated that an in-depth inquiry into that question would be made, in principle, in his next report.

67. The Special Rapporteur stated that the question relating to the two schools of thought - the permissibility and opposability schools, had generated wide debate in the Commission. The Special Rapporteur believed that an in-depth analysis of the related problems would be indispensable and indicated that one of his future reports would deal with this issue fully.

68. On the question of settlement of disputes, the Special Rapporteur stated that while the debate in the Commission had recalled that monitoring mechanisms were often provided by human rights bodies, the problem remained widely open in other fields. In his view, drafting of model rules for inclusion in future human rights instruments would be helpful in this respect.

69. Regarding the question of succession of States, the Special Rapporteur stated that most members did not believe that there was any urgent need to consider this issue; but that time allowing, the issue should be considered by the Commission at a later stage.

70. As to whether or not to set up a special regime for human rights treaties, the Special Rapporteur stated that the debate in the Commission had not been conclusive, some members had felt that States should be permitted to derogate from those conventions, while others expressed the opposite view. While some members held the view, for example, that human rights treaties were not based on reciprocity, others considered reciprocity to be at the heart of all treaties. According to the Special Rapporteur, therefore, in the light of these apparent contradictions, he believed that drafting of model clauses to be included in such treaties as well as in treaties in the field of the environment and disarmament could prove most useful to States.

71. Turning to the answers given by members to the questions he had posed, 13/ the Special Rapporteur, starting first with the title of the

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13/ See para. 27 above.

topic, stated that while some members had expressed procedural fears for such a change all members had supported his proposal to change the title of the topic to "Reservations to treaties".

72. With regard to bilateral treaties, the Special Rapporteur stated that he could in principle accept the views expressed by members that bilateral treaties should be excluded from the scope of the topic, subject to a more in-depth study which he intended to carry out, in principle in his next report.

73. Concerning the rules contained in article 2 (d), articles 19 to 23 of the 1969 and 1986 Vienna Conventions, and article 20 of the 1978 Vienna Convention, the Special Rapporteur stated that with minor nuances, all agreed that the rules contained in those provisions were invaluable and should be preserved as far as possible. The Commission's task should therefore merely be to fill the gaps and to clarify any ambiguities inherent in them.

74. As to whether the Commission should embark on drafting model clauses for insertion in future conventions, according to the Special Rapporteur, the Commission was almost unanimous in its affirmative response, and he shared the view that such a way of proceeding would be most helpful.

75. Regarding the form that the future work should take - whether the Commission should draft a convention, an additional protocol or guidelines, the Special Rapporteur stated that the response from the debate had not been conclusive. While most members seemed to prefer the drafting of guidelines, others favoured the drafting of an additional protocol. Still other members expressed preference for the drafting of a convention or articles which could later be transformed into a convention. A proposal was also made for the drafting of a restatement of the law on the topic.

76. While the Special Rapporteur believed that drafting of a single instrument would be of great value to States, such an approach would however, in his view, make the system of reservations more rigid. A more flexible approach seemed to be the drafting of guidelines. If the General Assembly expressed an interest for something with more binding force, the guidelines could then be transformed into a convention or into protocols.

77. Regarding the questionnaire to be sent to States and international organizations, even though some members saw no utility in doing so, the Special Rapporteur considered it useful to send such a questionnaire in order

to determine the actual practice of States and international organizations in this area. A useful proposal was also made to send a questionnaire to the principal depositaries of treaties.

78. As to the time-frame for concluding work on the topic, the Special Rapporteur indicated that the study of the topic should be concluded within five years.

79. At the end of his statement, the Special Rapporteur summarized as follows the conclusions he has drawn from the Commission's discussion of the topic under consideration:

(a) The Commission considers that the title of the topic should be amended to read "Reservations to treaties";

(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's Statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.

General conclusions

80. These conclusions constitute, in the view of the Commission, the result of the preliminary study requested by General Assembly resolutions 48/31 and 49/51.

81. At its 2416th meeting, the Commission, in accordance with its earlier practice, 14/ authorized the Special Rapporteur to prepare a detailed questionnaire to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions, as regards reservations to treaties. This questionnaire will be sent through the Secretariat to its addresses.

14/ See Yearbook of the International Law Commission, 1983, vol. II (Part Two), para. 286.